

Original

No. 367.

Brief of L. D. McKisick
IN THE

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

Filed Jan. 30, 1899.

OCTOBER TERM OF 1898

JOHN W. BLYTHE and
HENRY T. BLYTHE,

APPELLANTS.

VS.

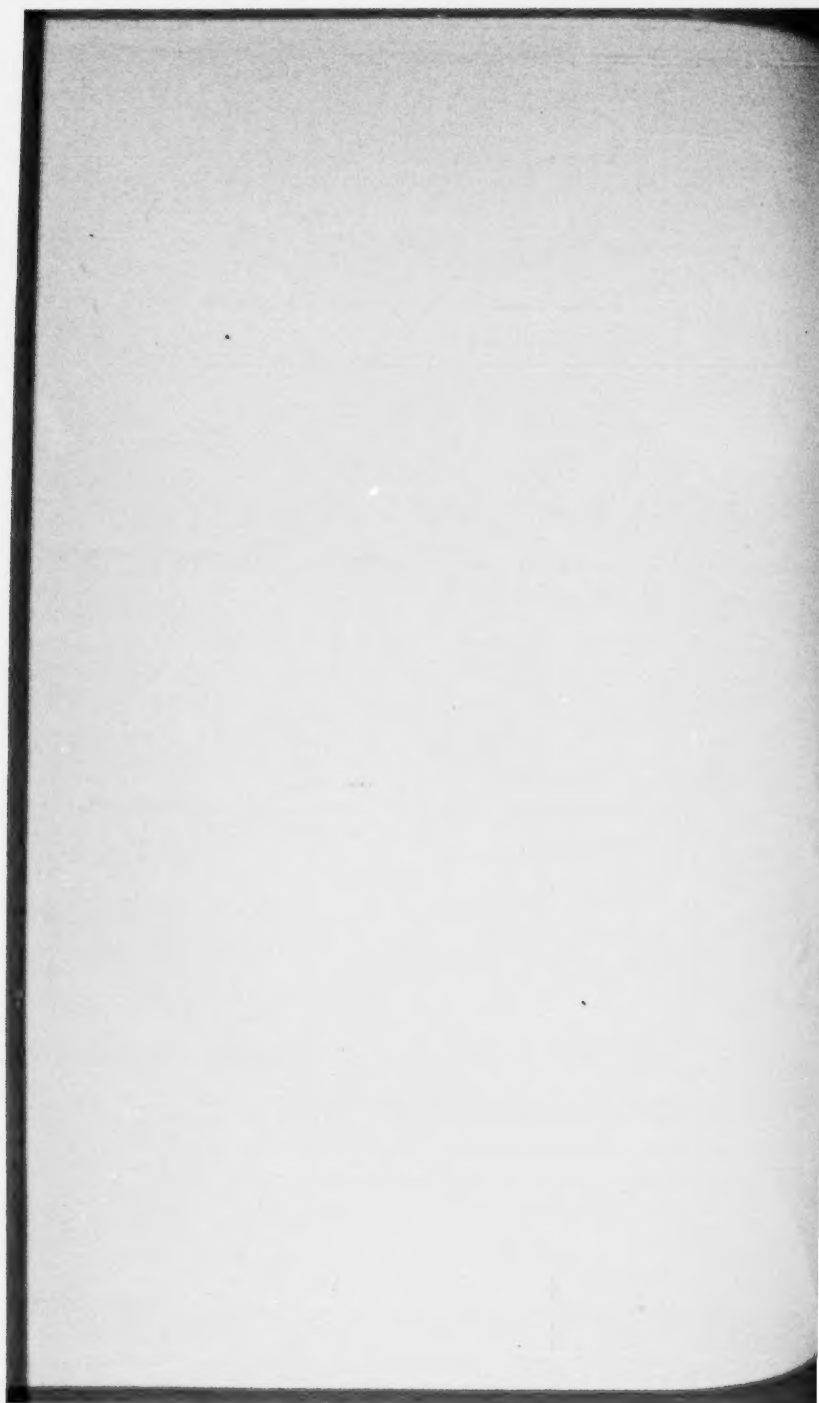
FLORENCE BLYTHE HINCKLEY,

APPELLEE.

16,952

Brief in Reply to Motion to Dismiss the Appeal

L. D. MCKISICK,
Counsel for Appellants.



IN THE
Supreme Court of the United States

October Term, 1898. No. 367.

JOHN W. BLYTHE and HENRY T. BLYTHE, <i>Complainants and Appellants,</i> vs. FLORENCE BLYTHE HINCKLEY, <i>Respondent and Appellee.</i>	}
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REPLY TO MOTION TO DISMISS.

This appeal comes here from a decree of the Circuit Court of the United States for the Northern District of California, dismissing the suit for want of jurisdiction.

The case is this: Thomas H. Blythe, a naturalized citizen of the United States, died unmarried and intestate in the City of San Francisco in the year 1883, leaving the real estate in controversy to descend to his heirs.

In December, 1895, John W. Blythe, a citizen of the State of Kentucky, and Henry T. Blythe, a citizen of the State of Arkansas, who are admitted on the record

to be heirs at law and next of kin of the said Thomas H. Blythe, filed their bill in the Circuit Court against the respondent, Florence Blythe Hinckley, a citizen of the State of California, to have their title to the real estate, described in the bill, quieted. This bill was filed after the decision of this Court was made in the case of *More vs. Steinbach* and reported in 127 U. S., page 70, to which we refer. Nine days after, namely, December 12, 1895, complainants filed an amended bill.

Afterwards, the complainants being advised by a certain plea in bar filed by the respondent to their amended bill of the grounds of the adverse claim of the respondent, which would be relied upon by her to defeat complainants' right, obtained leave to file a second amended and supplemental bill.

An inspection of the bill (pp. 5 to 13 of the record) will show that complainants alleged that they were the heirs and next of kin of Thomas H. Blythe; that the conflicting claim of the respondent was founded upon certain special proceedings and judgments thereon of the Superior Court in probate of the City and County of San Francisco and of the Supreme Court, which judgments they alleged were *void* for the reason that upon the facts stated in the bill the State Courts had no jurisdiction to render them; that complainants are not precluded from prosecuting their action in this Court, nor is the Court precluded from entertaining jurisdiction. (Record, p. 10, ff. 19-20). This bill was filed January 14, 1897. (Record, p. 13.) To this bill the respondent filed no plea, no demurrer, no answer; but on February 15, 1897, she served a notice on the solicitors of complainants that on March 1, 1897, she would

“move the Court * * * for an order dismissing
 “said suit. 1st. That, as appears from the second
 “amended and supplemental bill of complaint of com-
 “plainants filed in the above entitled suit, this Hon-
 “orable Court has no jurisdiction of the matters and
 “things in the alleged cause of action in said second
 “amended and supplemental bill of complaint stated.”
 (Record, p. 14.)

Ten months after said motion was made, namely, December 6, 1897, the Court sustained the motion and ordered the bill dismissed (Record, p. 28), with leave to complainants to amend. They thereupon filed a third bill, which was also dismissed and a final decree entered dismissing all of the bills “for want of either Federal or equity jurisdiction.” (Record, pp. 40, 41.)

The administrator of Thomas H. Blythe was not made a party, for the sufficient reason that an administrator never claims adversely to the heirs at law of the decedent.

As this is a suit in equity between citizens of different States involving title to real estate of the value of \$3,000,000 within the jurisdiction of the Court, it was the duty of the Court to hear and determine the controversy, unless the allegations of the bill ousted the jurisdiction.

That is the sole question for this Court to decide on the motion to dismiss.

The second and third amended and supplemental bills allege that the adverse claim of the defendant to the real estate in controversy is grounded solely upon the judgments and decrees of the State Courts. The bills were not filed to have the Fed-

eral Court review or reverse those judgments. That is not the purpose of the bill at all. The claim of the complainants is, and the bills allege, that the judgments are absolutely void, and that consequently the adverse claim of the appellee is false and groundless and without warrant of law, and that the appellee has not now and never has had any right, title or interest in or to the real estate in controversy as heir at law of Thomas H. Blythe, or otherwise.

When the complainants came into Court and alleged that they are the next of kin and heir at law of Thomas H. Blythe, and as such they inherited the real estate sued for, all of which the appellee by her motion admits to be true but sets up an adverse claim based upon certain judgments which the complainants allege are void, did not the Court have jurisdiction to inquire into the validity of the adverse claim and determine for itself whether the judgments set up in defense of and in support of the adverse claim were or were not void?

The jurisdiction of a Court to render judgment under which a party claims, or defends, can always be inquired into by any Court in which the judgment is relied on, and it is the duty of the Court to determine for itself upon such inquiry whether or not the Court which rendered the judgment relied on had jurisdiction of the parties and of the subject matter, *and whether there was any law in existence which authorized the judgment to be rendered.* If either of these elements be wanting upon the face of the record, the judgment is absolutely void, not voidable, and, in the language of the Supreme Court of California, in the case of *Forbes vs. Hyde*, 31 Cal., on p. 348, "may be attacked

“anywhere, directly or collaterally, whenever it presents itself, either by the parties or strangers. It is simply a nullity, and can be neither the basis nor evidence of any right whatever.”

That question of jurisdiction was for the Circuit Court to decide in this action, no matter what the State Courts may have decided, for, in the language of the Supreme Court of California, in the case of *McMinn vs. Whelan*, 27 Cal., p. 513: “It is a fundamental rule that no Court can acquire jurisdiction by the mere assertion of it, or by deciding that it has it.”

A judgment in violation of law is a nullity. *Page vs. Naglee*, 6 Cal., on p. 245.

So a judgment in favor of a party who has no right to sue is void. *Sullivan vs. Mier*, 67 Cal., 264. A judgment in a special proceeding without jurisdiction is void, and may be collaterally attacked. *Mulligan vs. Smith*, 59 Cal., 206, 233.

Where the Court has jurisdiction of the parties, and of the subject matter, if it exceeds its jurisdiction in its judgment, the judgment is void for the excess. *Bigelow vs. Forrest*, 9 Wall., 339; *Shriever vs. Lynn*, 2 How., 59.

“But it is an equally well settled rule in jurisprudence that the jurisdiction of any Court exercising authority over a subject may be inquired into in every other Court, when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings. The rule prevails, whether the decree or judgment has been given in a Court of Admiralty, chancery, ecclesiastical Court, or Court of common law, or whether the point

"ruled has arisen under the law of nations, the practice in chancery, or the municipal laws of States." *Williamson vs. Berry*, 8 How., 539-540. If this Court will examine the cases cited and commented upon in *Williamson vs. Berry*, on pages 540-541, it will have no doubt that the Circuit Court did have jurisdiction, and that it was its duty to inquire into the jurisdiction of the State Courts to render the judgments attacked in the bill. If the Circuit Court had exercised its jurisdiction, it does not necessarily follow that it was its duty to declare those judgments void; it might have decided either way, but we claim that it erred in deciding that it had no jurisdiction and in dismissing the bill on that ground alone.

The authorities are conclusive to the point that, although the Court which rendered the judgment attacked may have had jurisdiction of the parties and of the subject matter, it may exceed its jurisdiction in the judgment itself, as was decided in *Bigelow vs. Forrest*, 9 Wall., 339, *supra*. *Day vs. Micon*, 18 Wall., 160; *Ex parte Lange*, 18 Wall., 163, 176, 177, 178.

The bill also attacks certain laws of the State of California. Certainly the Circuit Court, as between these parties, had jurisdiction, and it was its duty, to inquire into the validity of those laws, and if it had found them to be unconstitutional they were no laws, and if the judgments were based upon or rendered under or pursuant to void laws the judgments themselves were void. As was said by this Court in *Ex parte Siebold*, 100 U. S., 376: "An unconstitutional law is void and is no law. An offense created by it is no crime. A conviction under it is not merely erroneous, but is illegal

"and void, and cannot be a legal cause of imprisonment." To same effect *Ex parte Yarbrough*, 140 U. S., 54; *Boyd vs. Alabama*, 94 U. S., 645.

II.

The Circuit Court has jurisdiction to inquire into and decide the question whether or not a judgment between the same parties, involving the same subject matter, when properly pleaded, constitutes a bar or an estoppel in a subsequent suit between the same parties involving the same subject matter. That principle or rule of law is axiomatic in this Court.

In the great case of *Aspden vs. Nixon*, 4 How., 466, 497, 498, one of the most thoroughly and exhaustively argued cases to be found in the reports, and which would be clearly analogous to this but for the fact that there was a will in that case, two decrees were relied upon.

On pages 497-498 the Court says: "As applicable to such state of facts, the rules of evidence governing Courts of justice are that a judgment or decree set up as a bar by plea, or relied on as evidence by way of estoppel, to be conclusive, must have been made (1) by a Court of competent jurisdiction." That raises the question: Was the Superior Court of the City and County of San Francisco, sitting in probate, and administering the State probate law, a Court of competent jurisdiction to determine the questions of international law involved in this case? The proceedings in the Probate Court were special proceedings under Sections 1663-1664 of the Code of Civil Procedure of the State, and was not a civil action within its general jur-

isdiction at all. The Supreme Court of California, in the case of *Smith vs. Westerfield*, 88 Cal., 374-378, et seq., gave careful consideration to the construction and operative effect of this Section 1664, and we respectfully appeal to this Court to read and consider the opinion and decision of the Court in that case, and determine for itself whether or not the Superior Court was by its jurisdiction competent to go beyond and outside of the limits of California and invest the appellee with inheritable blood *eo instanti* the death of Thomas H. Blythe. Did not the Circuit Court have jurisdiction to inquire into and decide that question? "(2) between "the same parties; (3) for the same purpose."

The question for the Circuit Court and for this Court to determine, is this suit for the same purpose as was the suit of *Blythe vs. Ayres*, 96 Cal., 532, 557, in which the judgment was rendered upon which the adverse claim of the appellee is grounded? The Supreme Court of California answered that question on page 557, when it said:

"Plaintiff's claim is based upon Sections 230 and "1387, respectively, of the Civil Code of California."

The Court then quotes the sections. Not a word is to be found in either as to the competency of a non-resident alien child, incapable of becoming a naturalized citizen at the death of Thomas H. Blythe, when the real estate in controversy descended to and vested in his next of kin and heirs at law.

A few words upon that opinion. There is no pretense that Thomas H. Blythe ever married Julia Perry, the mother of appellee, and yet on page 560 the Court said: "2. In a case of *legitimatio per subsequens matri-*

"*monium*, the place of marriage does not affect the "question."

The opinion then devotes fifteen pages to a discussion of that question, the baldest obitur to be found in any case, always excepting the opinion of Chief Justice Marshall in *Marbury vs. Madison*, 1 Cranch., 137, in which the Chief Justice wrote a splendid and luminous commentary on the Constitution, in a case in which the Court had no jurisdiction of the subject matter. But on page 563 of 96 Cal. the Court capped the climax when it said:

"This section takes a wide range; its operation is "not confined within State lines; it is as general as "language can make it; oceans furnish no obstruction "to the effect of its wise and beneficent provisions; it "is manna to the bastards of the world." (Overruling *Reddy vs. Tinkum*, 60 Cal., 458.)

Now, the Court did not feed manna to this particular bastard, but it did attempt to give to her \$3,000,000 worth of real estate which had descended to and belongs to the complainants.

We say that neither upon principle nor authority could the judgment attacked by the bill have been successfully set up by plea, or answer, as a bar or estoppel, by the appellee in support of her adverse claim.

If the Circuit Court, in the exercise of its unquestioned jurisdiction, had examined into the judgments relied upon as they are stated in the bill, it would have certainly found that they do not come within the rules necessary to create a bar or an estoppel. The Court would have found *that the point of controversy* must be the same in both cases, and must be deter-

mined on its merits. *Packet Co. vs. Sickles*, 24 How., 333; same case, 5 Wall., 580; *United States vs. Lane*, 8 Wall., 185; *Russell vs. Place*, 94 U. S., 606; *Mobile County vs. Kimball*, 102 U. S., 691;. The case of *Hoboken vs. Pen. R. R.*, 124 U. S., 656, involved title to same land, or part of same, which was involved in 7th Vroom., 540, and between same parties or privies. The Supreme Court, on appeal from the Circuit Court, would not follow the New Jersey case in 7 Vroom. (*Carroll vs. Carroll*, 16 How., 284-286-7.)

Section 1911, Code of Civil Procedure of California, declares:

“That only is deemed to have been adjudged in a former judgment which appears on its face to have been so adjudged, or which was actually and necessarily included therein, or necessary thereto.” This is but a declaration of the general law. *Ferrea vs. Chabot*, 63 Cal., 564, 570; *Davis vs. Brown*, 94 U. S., 423; *Altschul vs. Polack*, 55 Cal., 633; *Windsor vs. McVeigh*, 3 Otto, 274. Applicable to action of the Superior Court in refusing to allow complainants to contest the right of appellee to have the real estate distributed her. See record, p. 12, denying complainants’ right to be heard.

That the Circuit Court had jurisdiction to inquire into and determine the questions as to the scope and operative effect of the judgments presented by the bill is beyond controversy, and its decision to the contrary is manifestly erroneous. This Court has jurisdiction to examine the decree appealed from. There is no pretense that the appeal was not regularly taken. No just pretense that the complainants did not have the right, upon several grounds, to appeal direct to this Court

under Section 5 of the Act of 1891 establishing Circuit Courts of Appeals; no question that complainants did not do every act and thing required by the law and the rules of this Court to perfect their appeal; no question that they were not *rectus in curia* when notice of this motion to dismiss or affirm was given and served.

We have been served with a copy of a 100 page argument, not upon the motion to dismiss, but in support of the motion to affirm.

The argument commencing on page 48, and extending to page 78, is a mere *petitio principii*, for it assumes that this controversy involves only a State question, which we deny. The State statutes in regard to aliens are not within its power to enact. From July 4, 1776, to 1789, when the Constitution became the Supreme law of the nation, there were thirteen free, independent, sovereign States. Unless that sovereignty, as to international questions, was merged into the National sovereignty, we now have forty-six independent sovereign States, while we contend that, under the Constitution, we have one sovereign National Government and forty-five States with sovereignty limited to their own territory and over their own citizens and domestic affairs, no authority over citizens of other States within their own States, nor over citizens or subjects of foreign nations. If these axiomatic principles of our national government are truly stated, the argument is destitute of any merit.

Upon examining that argument, the Court will find that it confounds an inextricable mass of questions arising out of State sovereignty, National sovereignty,

the Constitution and Statutes of the State of California, the Constitution and Statutes of the United States, and international, common and probate law. It also confounds the question of the jurisdiction of Courts to inquire, collaterally, into the validity and operative effect of judgments or decrees rendered in one tribunal by another, and the jurisdiction of one Court to review or reverse judgments or decrees rendered in another Court. In fact, the argument confounds all distinctions. It contains propositions of law, as applying to the facts of this case, stated in a sort of *ego sum lex* way that are astounding. This is notably so when dealing with State sovereignty over its domestic affairs. Counsel cite many authorities in support of the proposition stated in the argument. This Court has stated that rule or doctrine many times in various ways, sometimes with, and sometimes without qualifying it, but when without qualification always in cases where no rights were claimed by citizens of other States. The case of *United States vs. Fox*, 94 U. S., 315, 320, one of the cases cited in the argument, states the doctrine as broadly as any case can state it. To prove the truth of this we quote the whole paragraph relating to the subject, to wit, on page 320:

“The power of the State to regulate the tenure of
 “real property within her limits, and the modes of its
 “acquisition and transfer, and the rules of its descent,
 “and the extent to which a testamentary disposition
 “of it may be exercised by its owners, is undoubted. It
 “is an established principle of law, everywhere recog-
 “nized, arising from the necessity of the case, that the

“disposition of immovable property, whether by deed, “*descent*, or any other mode, is exclusively subject to “the government within whose jurisdiction the property is situated. McCormick *vs.* Sullivan, 10 Wheat., “202. The power of the State in this respect follows “from her sovereignty within her limits as to all matters over which jurisdiction has not been expressly “or by necessary implication transferred to the Federal Government. The title and modes of disposition “of real property within the State, whether *inter vivos* “or testamentary, are not matters placed under the “control of Federal authority. Such control would be “foreign to the purposes for which the Federal Government was created, and would seriously embarrass “the landed interests of the State.”

We agree with everything contained in the quotation except the words “rules of its descent,” which we have italicized. That was probably a slip of the pen, for it never has been law since the Sixth Amendment to the Constitution, in our opinion, and most clearly not since the Fourteenth Amendment to the Constitution and Section 1978 of the Revised Statutes. To illustrate: suppose the Legislature of California should enact a statute declaring that upon the death of a citizen of the State intestate, owning real estate within the limits of the State, leaving children, some of whom are citizens of this State and others who are citizens of other States, the children who are citizens shall inherit the whole estate to the exclusion of the non-resident children. The right of the non-resident children would be protected against such a law by the express provisions of the United States Constitution and the Revised

Statutes. Admit that the State is sovereign over its own citizens as to its domestic affairs, it is not sovereign over citizens of other States, nor is it sovereign over aliens who were never in the State until after death and descent cast.

Suppose a case of the kind should occur, and a citizen of Kentucky, who was one of the children of the intestate decedent, should come to California, and, finding the estate of his father being administered in the Probate Court should go into that Court and file a petition to have his portion of the real estate distributed to him, and the Court should deny his right, and on appeal the Supreme Court should affirm the decree. Would the judgments be simply erroneous, or would they be void? Would they bar or estop him from filing a bill in the Circuit Court to have his title to his portion of the land quieted? A judgment contrary to a positive law is void. A void judgment is no judgment and need not be appealed from.

We say the complainants have a clear right to have the validity of the judgments mentioned in the bill inquired into, and the Circuit Court erred in dismissing the bill without having made that inquiry.

But, in the broad way the Court states the proposition, the State Legislature could deny to an alien protected by treaty the right to take by descent.

We submit that these complainants came frankly and openly into the Circuit Court and attacked those State Court judgments, and challenged the appellee to set them up in support of her adverse claim to the real estate in controversy. She declined the challenge, and attempted to answer it by resorting to a technical ob-

jection that the Circuit Court had no jurisdiction of complainants' cause of action; in other words, she made no attempt to support her adverse claim. And yet, on page 10D of their argument, counsel say they submit "whether this entire litigation in the Federal Courts is not so entirely groundless as to amount to an abuse of the process of the Court." We say, in view of the facts on the record, that ~~it~~ is a bold thing to say. Then again, they say, on the same page: "This question was really decided by the decision dismissing the writ of error, if we correctly apprehend the matter. But unfortunately for us the Court seemed to consider the question so plain as not to require an opinion (167 U. S., 746)." That decision is cited four times in the argument, evidently with the hope that the Court will be persuaded that it did have jurisdiction to decide and did decide the case on its merits, and that it did not, merely, dismiss the writ of error for want of jurisdiction. Such an argument may not be an abuse of the process of the Court, but it is certainly in contempt of the settled decisions of the Court. By the judgment of this Court (167 U. S., 746), the writ of error was dismissed for want of jurisdiction. The reports contain a great number of cases in which the writ was dismissed for want of jurisdiction, in not one of which did the Court decide that it had jurisdiction of the subject matter in controversy. In the terse language of Mr. Justice Swayne in *Mayor vs. Cooper*, 6 Wall., 250, the Court said: "If there were no jurisdiction, there was no power to do anything but to strike the case from the docket. In that view of the subject, the matter was as much *coram non judice* as anything

"else could be, and the award of cost and execution
"was consequently void."

Therefore, if "the question was really decided by the
"decision dismissing the writ of error," the decision
and judgment was void. We do not believe the Court
will concur with the counsel in their construction of
that decision.

Section 5 of the Act establishing Circuit Courts of
Appeals provides:

"That appeals or writs of error may be taken from
"the District Courts or from the existing Circuit Courts
"direct to the Supreme Court in the following cases:

"In any case in which the jurisdiction of the Court is
"in issue; in such cases the question of jurisdiction
"alone shall be certified to the Supreme Court from
"the Court below for decision. * * *

"In any case that involves the construction *or* ap-
"plication of the Constitution of the United States.

"In any case in which the constitutionality of any
"law of the United States, or the validity or construc-
"tion of any treaty made under its authority, is drawn
"in question.

"In any case in which the Constitution *or* law of a
"State is claimed to be in contravention of the Consti-
"tution of the United States."

The statute gave complainants the right of appeal
from the decree of the Court below upon each of the
grounds above stated. The petition, prayer and order
allowing the appeal are on pages 41-42 of the record,
and show that the appeal is a general appeal under said
Section 5.

The questions of jurisdiction certified up by the Cir-

cuit Court, and the assignment of errors on the record, show beyond question that the Circuit Court did have jurisdiction of the parties and of the subject matter, and the record shows that this Court has jurisdiction of this appeal, and we respectfully submit that the appellants have a constitutional and statutory right to have the judgment of this Court upon the merits of their case.

“Jurisdiction is the right to hear and determine; not “to determine without hearing.” *Windsor vs. McVeigh*, 3 Otto, 274.

It is a very grave invasion of the Constitutional rights of parties who, being *rectus in curia*, are denied the right of being heard in support of their right and claim to the subject matter in controversy. That is conspicuously so when, in a case like this, it is admitted on the record that the claimants are the next of kin and heirs at law of the decedent who owned the property when he died and descent cast, and who are clearly entitled to the property but for certain judgments rendered in another Court, which judgments are alleged to be void for want of jurisdiction of the party and the subject matter in the Court in a special proceeding, to render the judgments attacked.

If the party in whose favor the judgment was rendered had no right to sue for the thing claimed, the Court had no jurisdiction to adjudge the thing to the party so suing.

If there was no valid law in force authorizing the Court to render the judgment upon the facts of the case, the Court had no jurisdiction to render judgment. If there was a usurpation of jurisdiction, either as to party

or subject matter, the Court had no right to render judgment. If the Court rendering the judgment had jurisdiction of the parties and of the subject matter for some purposes, if it exceeded its jurisdiction in its judgment, the judgment is void for all matters in excess of its jurisdiction.

When any one of these matters is brought to the attention of another Court collaterally by a suit between the same parties, involving the same subject matter, the Court not only has jurisdiction to inquire into the jurisdiction of the Court which gave the judgments complained of and to determine whether they were or were not void, and whether or not they constitute a bar or an estoppel. In this case the appellee did not set them up either as a bar or an estoppel. In their motion to dismiss for want of jurisdiction there is no reference to them. In fact, the Court itself set them up and rendered its decree dismissing the bill without inquiring into their validity.

The uniform decisions of this Court for one hundred years condemn such a proceeding, no matter whether the judgment was rendered by a Court of admiralty, common law, or chancery. The case of the "*Betsey*," 3 Dall., 5, was decided in 1794. *Rose vs. Himely*, 4 Cranch, 240, was decided in 1808. They both involve questions of international law, as this case does. See the lucid statement of the principle by Chief Justice Marshall in the last case, 4 Cranch., on pages 268, 269, 270. In the next case, *Griffith vs. Frazier*, 8 Cranch., 9, the rule is stated to be that: "The acts of a tribunal

"upon a subject not within its jurisdiction are void." *Elliott vs. Piersol*, 1 Pet., 328. In considering the case of *Wilcox vs. McConnell*, 13 Pet., 496, involving a conflict of the statutes of Illinois with those of the United States, as we say here the statutes of California are in conflict with the Constitution of the United States, we invite the attention of this Court to what the Supreme Court said on page 516. In *Shriver vs. Lynn*, 2 How., 43, there was an excess of jurisdiction in the decree. *Hickey vs. Stewart*, 3 How., 750, a decree of the Chancery Court of Mississippi declared void for want of jurisdiction of the subject matter of real estate. *Williamson vs. Berry*, 8 How., 495, is valuable for the rules stated and authorities cited. *Thompson vs. Whitman*, 18 Wall., 457, is also a valuable case, which decided that a Court of New Jersey had no jurisdiction of the locus..

The foregoing cases show and decide that the Circuit Court did have jurisdiction to inquire into the jurisdiction of the State Court to render the judgments attacked and also into the validity of the State law under which the property of the complainants was taken from them and given to the appellee.

As this is a suit in equity this Court has jurisdiction to determine the whole case on its merits.

The appellee has staked her whole claim and defense on her motions to dismiss or affirm.

We have conclusively shown, in this brief, that the decree appealed from is erroneous. The motion to dismiss makes no attack upon the regularity of the pro-

ceedings taken to perfect the appeal. We have shown in this brief that the judgments of the State Court attacked by the bill are not sufficient to bar or estop appellants.

In our brief in reply to the motion to affirm, we have shown that the appellee is not the lawful heir of Thomas H. Blythe. That neither the Constitution nor Statutes of the State of California, nor any decision of her Courts could endow the appellee with heritable blood, or capacity to inherit, take or hold in fee the real estate of which Thomas H. Blythe died seized.

The appellee admits that appellants are next of kin and heirs at law of the said Thomas H. Blythe, and that they are owners in fee of the real estate described in the bill unless appellee is.

CONCLUSIONS.

1. The motion to dismiss the appeal must be denied.

2. The decree appealed from is erroneous and must be reversed.

3. As the appellee was and is incapable of taking and holding the real estate of which Thomas H. Blythe died seized, as his heir at law by descent, or otherwise, and has not, nor ever had, any right, title, or interest therein or thereto, her motion to affirm the decree below must be denied.

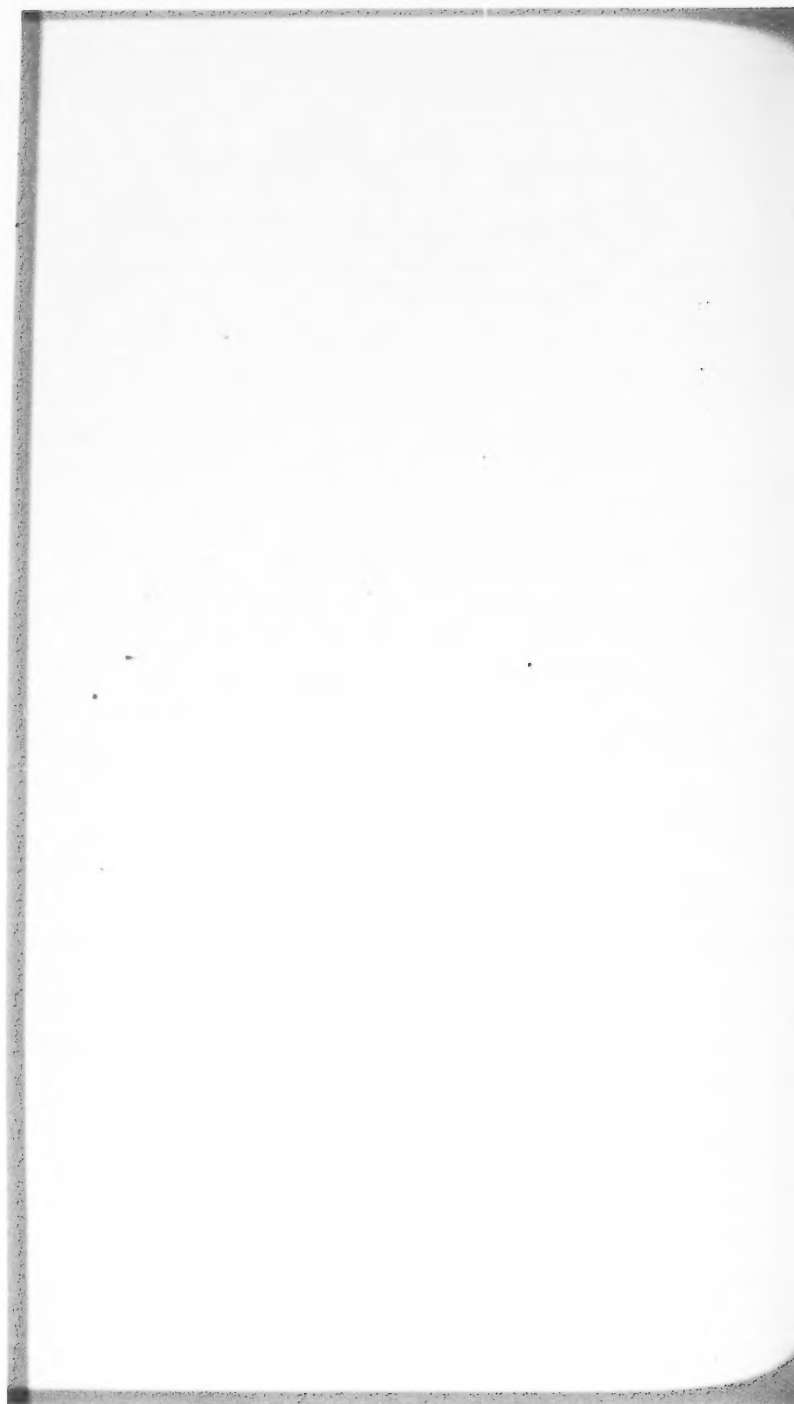
4. As appellants, as next of kin and heirs at law of Thomas H. Blythe, did inherit from him by descent the real estate which he died seized, they are the owners in fee of said real estate.

5. That appellants are entitled to a decree quieting their title to said real estate as against the appellee, and to be let into possession.

6. That appellants are entitled to a final decree in their favor upon the whole case made upon the record, and for costs.

L. D. McKISICK,
Counsel for Appellants.

L. D. McKisick
Counsel for Appellants.



N. 367.

FEB 6 1899

JAMES H. McKENNEY,
Clerk

IN THE
Reply Bx. of Holladay, Holladay &
Supreme Court of the United States.
Chancellor for Appts.

October Term, 1898.

Filed Feb. 6, 1899.
No. 367.

JOHN W. BLYTHE, and

HENRY T. BLYTHE,

Appellants,

vs.

FLORENCE BLYTHE HINCKLEY,

Appellee.

**Appellants' Final Reply Against Motion to
Dismiss or Affirm.**

Appellee in her reply brief concedes that the real question is, whether or not a State may pass a statute operating in the field of the treaty power in the absence of a treaty covering the subject of the statute,—she affirming that the State may do so; for she says (page 6), “to this we answered in the first place that the statutes in question are not void, because in the absence of a treaty the matter can be regulated by the States.”

Appellants say that this question was not presented or passed upon in the State Court. It is here sharply presented for the first time in the history of the government.

Appellee, after stating the point, tries to escape a discussion of it by leading off into immaterial matters.

Appellee lays great stress on that part of the record, quoted in reply brief, page 9, wherein it is said that ap-

pellants contested the right of appellee in the State Court, and claimed for themselves.

The Supreme Court of California holds that where one claims land against another, a denial of the claim and a statement that the defendant owns the land raises no new issue outside of plaintiff's claim. The statement that defendant owns it is, the Courts say, but an affirmative denial that plaintiff owns it, and raises no new or other issue.

Marshall *vs.* Shafter, 32 Cal., 176.

Bruck *vs.* Tucker, 42 Cal., 346.

Morgan *vs.* Tillottson, 73 Cal., 520.

But what difference does this make, if the State Statute relating to non-resident aliens is void because repugnant to the federal constitution?

PROPOSITION II.

On page eleven appellee says that "it makes no difference whether the alienage question was set up in the pleadings in the Superior Court or not." We submit that a judgment of a State Court is not *res adjudicata* on any question not presented to that Court for decision by the pleadings. If Florence did not plead alienage and did not claim the property under Section 671 of the Civil Code of California, as an alien, then she has never presented her claim to any Court in her true capacity. She cannot suppress her true capacity and claim estoppel of others until she has done so.

PROPOSITION III.

Appellee argues, that a Court cannot lose jurisdiction, if at one time the Court appeared to have it. That doctrine is exploded in *ex parte Bain*, 121 U. S., page 1; also, *In re Ayers*, 123 U. S., page 486.

In the first case cited the Court permitted the District Attorney to amend an indictment, all the trial Court did thereafter was held to be void.

PROPOSITION IV.

Counsel for appellee say, on page 8 of reply brief, that though a judgment in a criminal case on a void statute is void, yet this doctrine has no application to civil matters, "where the Court had undoubted power to award the "subject of the litigation to one party or the other." The Constitution says, that life, liberty or property shall not be taken without due process of law. Property comes within this protection as much as liberty or life. One can no more be taken on a void statute than the other. Appellants' property, which they inherited on the death of Blythe, cannot be taken from them by Section 671 of the Civil Code of California if void, any more than their liberty can be taken from them on a void statute. This Court will look into civil or criminal proceedings of a State Court or any Court, when such proceedings are offered in evidence; first, to see what the issues were in such proceedings under the pleadings therein, and second, to see if such proceedings were void, or are in conflict with the Constitution of the United States. This was done in *In re Ayers*, 123 U. S., page 485-507. The proceedings there reviewed collaterally were civil proceedings and were held void.

PROPOSITION V.

We respectfully ask the Court to bear in mind that no proceedings have taken place in the State Court except upon the petition or complaint of Florence. She was ineligible to claim the estate. Any action of the Court taken on her petition or complaint was *coram non judice*. The State Court got no jurisdiction at the instance of any other claimant. Appellants simply put in issue her claim, nothing more. This being void, the proceedings were void.

The decision in *Plaquemines Fruit Co. vs. Henderson*, 170 U. S., p. 511, though cited by appellee, overthrows the contention of appellee in this case,—namely: that the Circuit Court of the United States has no jurisdiction of a

bill in equity relating to a subject matter that has been previously heard in the State Court, though the prior proceedings in the State Court are in fact and law void.

Appellee contends in this case, that if the State Court has previously passed on the matter involved generally, which matter is the subject of the bill in equity, filed in the federal Court, that fact is the end of controversy, whether the State Court had the same issues before it or not; or whether or not its proceedings were repugnant to the Constitution of the United States; or whether the State Court had or had not jurisdiction. In the case in 170 U. S., the Federal Court held that it had, on a bill in equity, jurisdiction to look through the prior State proceedings, to see if they were void though the State proceedings had been affirmed in the highest Court of the State and a writ of error to the Supreme Court of the United States had been dismissed. In the case at bar, it is contended by appellee, that the Federal Court has no jurisdiction to look into the State proceedings to see if they be void or repugnant to the Constitution of the United States, or were really res adjudicata.

CONCLUSION.

Appellants respectfully say that they are entitled to an oral argument on the question, whether the Court below decided correctly or not. The great bulk of appellee's brief is devoted to this question, and is not confined to the question of jurisdiction at all.

Appellants ought not to be forced to argue the merits of the entire case on a motion to dismiss.

If the California Statute in question is void, because an invasion of the treaty-making power, and because it violates the Federal Constitution, then all of the decrees in question are void; and all of the many legal arguments used by opposing counsel to dignify and support these decrees fall with them.

S. W. HOLLADAY,

E. B. HOLLADAY,

Solicitors for Appellants.

JEFFERSON CHANDLER,

Of Counsel.